

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 04-02

Date: April 22, 2004

TO : All Division Heads, Regional Directors, Officers-in-Charge,
and Resident Officers

FROM : Arthur F. Rosenfeld, General Counsel

SUBJECT: General Counsel Responses to Questions Propounded by the
Practice and Procedure Committee (P&P Committee) of the Labor
and Employment Relations Section of the American Bar
Association

Chairman Battista, Members Leibman and Meisburg and I attended the Annual Midwinter meeting of the P&P Committee from February 23 through 26, 2004. Agency participation in the meeting was sponsored by the Committee. At this meeting I provided responses to questions that the Committee had submitted to me earlier in the year. It is important that you and your staffs be aware of these responses and I am therefore taking this opportunity to share them with you.

As was the case last year when I reported to you of my meeting with the P&P Committee, I was greatly encouraged by the absence of any general complaints that the Regions do not enforce the Act evenhandedly. The scarcity of such complaints about case processing clearly indicates that Agency employees are doing an excellent job enforcing the law in often highly charged circumstances. The Summary of Operations for Fiscal Year 2003 reported that casehandling in the Field continues at a very high level of efficiency. My meeting with the P&P Committee evidences that we did it evenhandedly as well. I commend all of you and offer my thanks for these fine efforts.

The attached document lists the questions asked by the Committee and summarizes our answers.

/s/
A.F.R.

cc: NLRBU
Release to the Public

MEMORANDUM GC 04-02

Responses to Questions from the ABA Practice & Procedure Committee
Mid-Winter Meeting 2003

Delay in Service of Petition: A party recently reported receiving the initial notice of filing of a petition by facsimile seven (7) days after filing, and by mail fourteen (14) days after filing. Is the Agency experiencing delays in service of petition or other filings?

Response: The experience of the party referred to in the question is highly unusual and, if the case is identified, we will inquire further into the matter. From our performance in the areas of Decisions and Directions of Elections and Decisions and Orders (in FY 2003 a 39-day median) and from our election statistics (a 40-day median with 92.5% of elections conducted within 56 days), it is apparent that any tardy service of petitions would be an extraordinarily rare occurrence.

Hearing Officer discretion to grant extensions of time (beyond seven days) to file post-hearing briefs in representation cases: Practitioners report that joint requests are being denied or referred to the Regional Director. What is the Agency's position with respect to joint requests? Are they considered or given any weight?

Response: The fact that a request for an EOT is made by both parties can be a factor in the consideration given the request by the Hearing Officer and Regional Director. However, the overarching concern must be our policy of expedition in the handling of representation cases.

That policy is contained in Section 11244.2 of the Casehandling Manual – Representation Proceedings. Hearing officers are made aware of this section of the Casehandling Manual during their initial training and reminded of it in training sessions over the course of their careers. Appropriately, this information will influence the hearing officer's exercise of his or her discretion when ruling on a request for an extension, regardless of whether the request is made jointly or solely by one party. Parties dissatisfied by the hearing officer's ruling on requests for extensions still have the opportunity to, and regularly do, request additional time from the Regional Director.

What is the Agency's median time period from petition to election? To what extent has the median varied over the past several years? Does it vary from Region to Region (a practitioner recently reported a region insisting on an election within 36 days of the filing of the petition)? What factors contribute to these results? Also, has the Agency considered stating in the petition notification letter that it is the Agency's intention to conduct elections arising from representation petitions within a median of 42-49 days of their filing (if that is the Agency's stated intention)?

Response: The Agency goal is to process representation cases from petition to election in a median time of 42 days and our experience has been consistent with this goal. In Fiscal Year 2003, the median time to proceed to an election from the filing of a petition was 40 days, a slight decrease from the 41-day median in Fiscal Year 2002. In Fiscal Year 2001, the median time to proceed to an election from the filing of a petition was 40 days.

There are some variations in performance from Region to Region resulting from Regional caseload and staffing. We have taken under advisement the suggestion that correspondence sent to the parties include statements that elections would be conducted within a specific period of time after the filing of the petition.

Without more information I cannot comment on the practitioner's reported experience in one Region where an agent insisted on a 36-day election. Because the performance goal is a 42-day median, any election below the median, whether at 41 days or 36 days, would not change the Region's overall performance. Thus, and most importantly, our Directors receive no "extra credit" for conducting elections in a shorter time period than their goals.

Has the Agency received any privacy/integrity complaints/concerns arising from the use of new lightweight polling booths, which reportedly do not have curtains?

Response: We are not aware of any complaints or concerns regarding the use of these voting booths. Prior to providing these booths to the field as an alternative to the standard metal voting booths, the Agency conducted a pilot study involving two Regional Offices to examine the feasibility of the lighter booths and solicit feedback from Board agents using them to conduct elections. No problems were reported with their use. Board agents who traveled by airplane or public transportation commented that the smaller size and weight of the newer booths was a particular advantage.

The lightweight booths have privacy panels, but do not fully enclose the upper torso of the voter as do the standard metal booths. While the lightweight booths may not be as flexible as the metal booths, in terms of placement in the polling area, Board agents have the expertise to compensate for this variable. Use of the lightweight booths is optional and left to the discretion of the Board agent conducting the election. If a party has a particular concern about the use of the lightweight booths, they can request that the agent utilize a standard booth. That request will be considered and accommodated, if possible.

Appeals: OM 03-101 (August 5, 2003) now officially allows for an appeal to be filed without written reasons. If the appealing party subsequently submits a position statement limiting the appeal or focusing on certain factual or legal issues, is the charged party entitled to a copy of the

submission? If so, must the charged party have a written request for any such submission on file? Must the charged party assume that the entire case is appealed? May the parties discuss the status of the appeal, the anticipated time to decision or the issues on appeal with the assigned Appeals attorney? Is there a mechanism in place to notify the Office of Appeals that a ULP charge is blocking a representation petition? If so, is the appeal expedited? What is the average time for a decision? What is the time if expedited? Are the parties' submissions ultimately disclosed under FOIA? What is the rate of reversals?

Response: [OM 03-101](#) implemented the rule change concerning the content of appeals. This revised rule did not work a change in practice. Indeed, the Office of Appeals has long accepted the simple filing of a Notice of Appeal as an appeal. Since the rule change, about 13% of appeals were filed by the filing of the Notice.

A party can request a copy of the appeal. While the appeal is pending, the General Counsel, in his discretion, has maintained a practice of releasing briefs, letters, or statements submitted in support of or in opposition to an appeal of a dismissal of an unfair labor practice charge, even though these documents may be withheld under the Freedom of Information Act. These documents are redacted to protect the privacy interests of the parties and witnesses. If an appeal is sustained, these documents are only released if required by the FOIA. In closed cases, whether the appeal has been sustained or denied, appeals and attachments thereto are released to requesting parties with the appropriate redactions under the FOIA. A request must be made in writing before a discretionary disclosure will be made. The Office of Appeals does not notify the charged party regarding the scope of the appeal. The charged party is free, of course, to request a copy of the appeal.

A party who calls the Office of Appeals will be told the status of the appeal and may ask to talk with the supervisor assigned to the case. The supervisor will discuss procedural matters regarding the appeal but we discourage substantive conversations regarding case issues. If a party wishes to supplement arguments made to the Regional Office, it is most effective to make these presentations in writing. If the Office of Appeals needs additional information or clarification from the parties, we generally work through the Regional Office.

We do have mechanisms to notify the Office of Appeals that a ULP charge is blocking a representation petition (see Casehandling Manual Section 10122.10, Request for Expedited Processing of Appeal). When so informed, the Office of Appeals will expedite its consideration of the appeal.

In Fiscal Year 2003, the median time for processing all appeals was 47 days after receipt of the Regional Office file. The average time for processing

expedited cases was 29 days after receipt of the Regional Office file. In Fiscal Year 2003, the reversal rate was 1.2%.

Advice: Are any of the issues/procedures raised above with respect to appeals applicable with respect to pending Advice matters? What are the Advice time lines? How many cases are submitted for Advice on an annual basis? What is the current merit factor? Are the cases prioritized and, if so, on what basis?

Response: When Regional Offices submit cases to Advice, they routinely notify both charging and charged parties of that fact and of the specific issues on which they are requesting guidance. Any party position statements submitted during the Region's case investigation are forwarded to Advice and parties are free to submit supplemental statements directly to Advice. However, we seek to avoid having parties make arguments to Advice without first having made them to the Region as the Region should have the benefit of the party's argument when making its determination on an issue. The parties' statements are not disclosable under FOIA while the case is open.

Parties are free to discuss with Advice the status of the case, anticipated time of disposition, and the issues being considered by Advice. If a party raises new facts or arguments in written, oral, or electronic communications, Advice (or, when appropriate, the Region) will apprise and give the other party an opportunity to respond or comment.

Submissions to Advice fluctuate around 775 cases per year: for example, in the past five years, Advice intake was as low as 731 cases in FY 1999 and as high as 866 cases in FY 2003. In FY 2000, intake was 824; in FY 2001, intake was 777 cases; and in FY 2002, intake was 744 cases.

The Division's historical timeliness goal has been to process cases in a median of 25 days. Recent performance has been consistent with that goal. In FY 1999, the median case processing time in the Division of Advice was 24 days; in FY 2000, the median case processing time was 20 days; in FY 2001, the median case processing time was 21 days; in FY 2002, the median case processing time was 21 days; and in FY 2003, the median case processing time was 22 days. Advice does not calculate a "merit factor."

All cases submitted to Advice are monitored for timeliness; management of the Division's caseload includes insuring that cases are resolved within established time targets. Cases are given priority for case processing based on:

- the statutorily mandated priorities (for example, Section 8(b)(4) and 8(b)(7) cases where active conduct is occurring and cases in which the Region believes Section 10(j) proceedings are warranted);
- the need to meet filing deadlines and other deadlines imposed by ongoing litigation; or

- a significant impact the conduct at issue is having in the workplace or community affected, including blocking election petitions.

Deferral of 8(a)(5) Information Request Charges: In *Ball-Foster Glass Container* the General Counsel decided to issue complaint, but also directed Counsel for the General Counsel to use this case to have the Board reconsider its deferral policy, arguing that “deferral of selected cases will be more efficient and less costly for the parties, while at the same time freeing up valuable Board resources.” What is the status of this issue? Practitioners report that they have been advised by Regions that the General Counsel’s Office has issued instructions in this area, which are not available for public distribution; practitioners also report that different Regions are handling cases regarding this issue differently. Are there any instructions to the Regions regarding the handling of refusal to furnish information cases? If so, have these instructions been made public? What is the impact, if any, of *Shaw’s Supermarket*, 339 NLRB No. 108 (2003) on this issue? Practitioners also report that Regions defer such cases after convincing an employer to arbitrate where there is otherwise no arbitration obligation. Is there a policy on this issue?

Response: The General Counsel continues to hold the view that deferral may be appropriate in certain cases involving requests for information relevant to grievance processing and that the Board should reconsider its blanket policy against deferral. He continues to look for appropriate cases in which to request that the Board do so, evaluating cases submitted on their particular circumstances. This does not mean that we are deferring such cases administratively. To the contrary, Regions are instructed to follow Board law and issue complaint in all cases involving a meritorious charge of failure to provide information relevant to grievance processing. In those cases deemed appropriate, Regions have been authorized by Advice or Appeals to argue that the case presented an opportunity for the Board to reconsider its blanket policy against deferral. This has been done on a case-by-case basis and no general policy has been issued on this subject.

A larger number than usual of extended or delayed investigations have been reported. For example, in a discharge case filed this summer, the Board agent advised that the investigation would likely not commence until the Spring 2004, and in one Region, it was reported that priority cases have been assigned to unavailable Board agents. In one case, involving multiple Regions, charges filed in January 2003 have not resulted in a complaint or dismissal. Are there any explanations and/or policy considerations for these timeliness issues?

Response: It is difficult to respond to these questions without reference to specific case names or docket numbers. We can report that our experience and

records indicate that the predicate for this question, viz., an unusual number of extended or delayed investigations, is incorrect.

Each Region is required to file monthly reports with the Division of Operations-Management listing all cases exceeding the casehandling time goals for that month. These reports are scrutinized closely by the Deputy Assistant General Counsel, or Assistant General Counsel, assigned to monitor and grade these reports. This review process is designed to detect any problems with a specific case or, more generally, with the Region's casehandling systems. A discharge case is a Category III charge and the operational goal is to render a decision in the case within 49 days. While Regions do not meet that goal in every case, not investigating a case for several months would clearly be inconsistent with the casehandling system and should be detected in our review of Regional reports.

The processing of priority cases is, by definition, accorded expedited treatment. The complaint that this was not being done in a Region was taken very seriously and, if proven, would have highlighted a serious breach of the Agency's protocol for priority charges. Representatives of the Division of Operations-Management searched the national database for every priority case filed in the Region since 1999 in which the law firm of the complaining attorney was listed as a party representative. There were nine such cases. The records in these cases showed that the investigations were commenced promptly and that disposition in each was reached at or near the due date.

The question also raises the issue of a charge filed in a Region in January 2003, involving a multi-regional dispute, in which no complaint or dismissal letter has been issued. Without the name or docket number of the case we cannot be responsive to the question. If a charge is filed in one Region involving a dispute occurring in several Regions or if several charges are filed in a number of Regional Offices with related allegations, they are coordinated by the Division of Operations-Management. If more than one office is involved, a lead Regional Office may be designated to ensure the consistency of the decision-making process. Given the nature of the inter-regional impact of these cases and/or the presence of novel legal issues, it would not be unusual for these cases to be submitted to the Division of Advice.

The investigation of a multi-regional case or series of cases may often be extended and time goals often will be exceeded. Accordingly, it is indeed possible, depending on the number of charges and the complexity of the issues, that several months may elapse before final merit decisions are reached on a series of coordinated cases and the parties informed of those decisions.

Third Party Witnesses: Counsel for parties report not being allowed to sit in during the interview of a third-party witness who had requested counsel's presence, unless counsel signed a statement asserting that counsel

personally represented the third party individually (which is generally not the case). Under what circumstances would the Regions exercise discretion in granting such a request?

Response: As set forth in ULP Casehandling Manual Section 10058.4, longstanding Board policy provides that the attorney or other representative of a party to the case will not normally be allowed to be present at an interview of a witness who is not a supervisor or agent of that party. If the witness insists on the party attorney or representative being present, the Regional Office should exercise discretion in deciding whether to proceed with such an interview. The guidance for the exercise of this discretion is set out at CHM 10058.4. If the Regional Office declines to proceed with the interview of the witness in the presence of such attorney or other representative, the Regional Office may issue an investigative subpoena to the witness without notice to the party's attorney or representative. Alternatively, the Regional Office may permit the witness to submit documentary evidence or a statement that, if timely submitted, will be considered.

To what extent does the Agency consider the evidentiary and ethical rules of the various states when investigating matters/interviewing witnesses? Has guidance been issued by the General Counsel's Office to Regions? Is there a plan to make it public? Is there a means by which practitioners can participate in evidentiary and ethical rule decision-making by the Agency?

Response: The Agency recognizes that all parties and witnesses are entitled to be represented by attorneys or other representatives. The Agency's policies regarding contacts with represented parties and witnesses and guidance for compliance with those policies are set forth in the new ULP Casehandling Manual (Section 10058) and OM 02-36, both of which are currently being used by our Regional Offices and have been released to the public.

As a general rule, unless otherwise authorized by law, all attorneys, including Agency attorneys, must comply with the ethics code adopted by their licensing State or States and with the ethics codes adopted by the Federal courts before which they appear. Although ethics rules may vary from jurisdiction to jurisdiction, all State bar and Federal court ethics codes contain essential elements of ABA's Model Rule of Professional Conduct 4.2 (MR 4.2).

We regard the guidance given to our Regional Offices concerning ethical rules and their evidentiary implications as internal advice and not any type of formal ruling. We are currently considering whether to publicize internal ethics advice given to the Regions, and if so in what form.

Translation and Other Witness Assistance: Under what circumstances will a party be permitted to have a bilingual representative present during a foreign language interview solely for the purpose of monitoring, or

assisting with the translation of a witness' statement (given the Agency's translator would be able to detect any improper coaching or assistance)? We are mindful of the Agency's desire to ensure the integrity of its witness affidavits. What is the General Counsel's policy? Are there written instructions to the regions? If so, are the outstanding instructions consistently applied?

Response: The General Counsel's policies concerning casehandling are contained in the National Labor Relations Board's Casehandling Manual, Part One, Unfair Labor Practice Proceedings. Copies of the manual are issued to each Board agent and the policies contained therein are consistently applied in all of the field offices. There are no instructions in the Casehandling Manual with regard to the assistance of party-supplied translators in an interview with a non-English speaking witness. However, General Counsel policy has been published in this area in [GC Memorandum 03-02](#), dated April 21, 2003, in our report on our meeting with the Committee last year.

Witnesses who are supervisors or agents of a party represented by an attorney may not be interviewed without notice to the party's counsel and without affording counsel the opportunity to be present. Sections 10054.3 and 10058.4 of the Casehandling Manual provide that third-party witnesses have a right to be represented by their individual attorney or representative during an interview. The presence of such representative is not permitted to unduly delay or hamper the interview. Thus, if a non-English speaking, third-party witness insists on having his or her representative present during an interview, any assistance provided by such representative during the interview, such as providing translation assistance, would only be permitted on a very limited basis.

Board Agent Comments to Witnesses: While we believe it is understood that Board agents are only to communicate with the party's designated representative, it has been reported that Board agents are commenting to witnesses as to the merits or "value" of the charge (as e.g., "This is not a very good case. I think the RD is going to dismiss"). Is there any stated policy in this regard? If not, would the Agency be receptive to issuing appropriate guidance to the Regions?

Response: Agency casehandling and training materials provide clear guidance to Board agents regarding their role in the investigation. For instance, Section 10050 of the ULP Manual states that Board agents are impartial investigators who should not provide advice to the parties and must remain neutral throughout the investigation. Similarly, Section 10060.3 emphasizes that in dealing with witnesses, Board agents must clearly convey their complete neutrality. The types of comments attributed to Board agents in this question are not consistent with existing Board guidelines concerning the appropriate role of an agent in the investigation process. To the extent that a party believes that a Board agent made comments to a witness that transgressed Board guidelines, that conduct should be reported to the Regional Director.

It should, however, be kept in mind that the obligations of a Board agent to freely identify and discuss the theories underlying the charge with both parties, some of whom are also witnesses, can involve a discussion of the state of the investigative record. Thus, it would not be inappropriate for a Board agent, mindful of the “skip counsel” rules, to engage in a discussion with a party that touches upon the relative strength of a theory, evidence or a witness’s testimony. Indeed, parties often actively seek to engage in these discussions in order to formulate a plan for responding to the requirements of an investigation.

The Agency believes that current manuals and training materials on this subject are sufficient. While the Agency periodically updates and improves its manuals and training materials, there is no current effort underway to develop materials devoted to this subject.

Investigatory Subpoena Issues: Now that there has been a delegation to Regional Directors, what are the results of the General Counsel’s monitoring of the necessity and numerosity of their issuance as to parties and non-parties and as to subpoena duces tecum and ad testificatum (as the General Counsel indicated would be done at P&P’s February 2003 Midwinter meeting), and are there any plans to provide additional written (published) guidance to Regional Directors as to the circumstances in which the issuance of investigative subpoenas would be appropriate? Assuming it is a represented party, is it the practice to serve the subpoena upon the party’s representative? What has been the impact of the delegation of authority to issue subpoenas?

Response: The delegation of investigative subpoena authority appears to be working well. In 2002 the Regions used these subpoenas, sometimes more than one, in 279 cases. That represented use in .92% of the 30,177 cases that we processed that year. In 2003, the number of cases in which they were used increased from 279 to 326 with the overall case intake slightly lower at 28,794 cases. This resulted in a percentage increase in 2003 to 1.13%.

With respect to the merit factor and the use of subpoenas, we noted that in 2002 the overall merit factor was 36.1% and in 2003 it was 37.0%. If the cases in which investigative subpoenas were used are isolated, the merit factor in 2002 for those 279 cases was 67% while in 2003, it dropped to 56.6% for that year’s universe of 326 cases.

Of course, those figures are well above the overall figures. But when you focus on the fact that subpoenas are most often used in the cases in which evidence disclosed in the investigation raises a suspicion of merit, it evidences that there are a fairly large number of cases that did not go to complaint because of evidence obtained by subpoenas.

As part of our internal quality control mechanisms in the Office of the General Counsel we look to see how Regional Directors use their investigatory powers both with and without subpoenas. One aspect of our quality control is a review of what happens with any motions to quash filed in response to these subpoenas. In FY 2003 there were 23 such motions. The Board denied the petitions in 22 of them and partially denied it in the 23rd.

Issuance of Complaint: Absent special circumstances (10(j) or Advice) and while apparently mindful regarding items of special interest reflected in General Counsel memoranda, the Regional Directors issue complaints on their own initiative. While each year there is a quality review in which there is a reflective look back at selected cases regarding whether complaint should have issued (or not issued), there is currently not any ongoing review of complaints by Operations Management. In light of *Precision Concrete*, is the General Counsel giving any consideration to the review of currently issued complaints via transmittal memoranda from the Regions as was the practice in the past?

Response: The short answer is yes: we're looking into it. Currently, in addition to the quality review process, the Division of Operations-Management has other means of reviewing Regional performance. They review Board and ALJ decisions, a process that sometimes highlights pleadings or substantive legal problems with a Regional Director's case and monitors the Region's litigation success rate. Operations will also respond to party complaints regarding a Regional Director's complaint and, in so doing, reviews the complaint and the supporting file documents. In addition, Regions consult with the Divisions of Advice and Operations-Management about complex or novel issues.

The General Counsel has a strong interest in maintaining the highest quality of all aspects of casehandling, including decisions to issue complaint and the adequacy of complaint pleadings. In considering resumption of the transmittal memoranda requirement, we are considering whether the enhancement in the quality of the process is worth the resources that would have to be devoted to it.

Section 10(j) Injunctions: Please provide an update regarding the type and number of cases in which 10(j) relief has been requested/recommended/authorized, the time from charge to request to recommendation to authorization, and the success rate in the courts.

Response: In Fiscal Year 2003 (FY03), the Regional Offices submitted 90 Section 10(j) cases to the General Counsel. Of those requests, the General Counsel requested 10(j) authorization from the Board in 24 cases. The Board authorized 17 cases and denied 3 cases. The remainder were either pending before the Board at the end of the fiscal year or the underlying administrative case had settled before the Board acted on the General Counsel's 10(j) request.

Those 24 cases were distributed among the traditional Section 10(j) categories as follows:

Category	(Description)	# cases
One	(Interference with Organizational Campaign (no majority))	5
Two	(Interference with Organizational Campaign (majority))	5
Four	(Withdrawal of Recognition from Incumbent)	6
Five	(Undermining of bargaining representative)	3
Six	(Minority union recognition)	2
Seven	(Successor refusal to recognize and bargain)	3

The three cases in which the Board denied Section 10(j) authorization all involved Category four cases.

Of the 17 Section 10(j) authorizations, the Regions filed 15 petitions for injunctive relief in the district courts. District courts granted injunctions in whole or part in eleven cases; three cases settled; and two cases were withdrawn prior to a court decision. One case is pending. Thus, the Board's Section 10(j) "success rate" for FY03-authorized cases was 100%.

The median time for processing cases in FY03 in which the General Counsel sought 10(j) authorization was 30 days from the Regional request to the General Counsel recommendation to the Board, excluding any deferral time.

FOIA Requests: What is the Agency's policy regarding release of witness affidavits in closed cases? How long after closure are FOIA case files retained? Is there any monitoring by the Regions or in Washington regarding timely compliance with FOIA requests? What are the time goals for responding in the Regions and on Appeal?

Response: The Agency's policy regarding the release of witness affidavits in closed cases is as follows: Board agent-prepared affidavits are protected in full under FOIA Exemption 5 (attorney work product), and under Exemptions 4 (proprietary business information), 6 and 7(C)(personal privacy), and/or 7(D) (identity of confidential informant), as appropriate. Attachments to Board agent-prepared affidavits are disclosable with deletions pursuant to FOIA Exemptions 4, 6, and 7(C) and (D). Non-Board agent-prepared witness statements and any attachments thereto are treated like any other documents in a closed case file; that is, they are presumptively disclosable, subject to redactions pursuant to FOIA Exemptions 4, 6, and 7(C). Additionally, in closed cases, Regions may release, as an exercise of the General Counsel's discretion, Board agent-prepared affidavits where the affiant has brought an action against the requester in another forum that raises the same or related issues as those involved in the Board proceeding. Prior to any such discretionary release, the Agency

redacts information from the affidavit pursuant to FOIA Exemptions 4, 6, and 7(C) and (D).

Official case files are transferred to a Federal Records Center two years after the "cutoff" of the file, which occurs at the close of the calendar year during which the case was closed. The Federal Records Center destroys the files 6 years after the cutoff. Between one and three percent of Agency files are designated for permanent retention in the Federal Records Center based on historical significance. A FOIA request can be made for records maintained in the Federal Records Center.

Our goals for responding to a FOIA request are governed by the statute, which requires responses within 20 working days, plus an additional 10 working days for special circumstances. Our annual FOIA report (available on the Agency's website www.nlr.gov) reflects the median time for processing FOIA requests Agency-wide. For fiscal year 2002, the median processing time for response was 11 ½ working days, well within the 20-day limit required by the Statute.

General Notice of Appearance: Why was it decided to discontinue general notices of appearance? (OM 04-01, October 14, 2003) Does the new policy free a Region from notice to a practitioner who has recently represented a party in an action before that Region, when that same party is named in either a newly-filed petition or charge? Does the new policy apply to in-house corporate and/or union counsel? Will the Regions continue to honor a practitioner's request for notification (Form 4702), as distinguished from a general notice of appearance, on an annual basis?

Response: Memorandum [OM 04-01](#) dealt with several issues concerning communications with representatives. Regions were advised that a general notice of appearance seeking to represent a specific party for all cases before the Region should no longer be accepted. As set forth in the memorandum, this policy was adopted to avoid placing any Board agent in a position where he or she might inadvertently violate the skip counsel rules of a state bar association, and therefore be subject to sanctions by the bar. Such circumstance might arise if a general notice of appearance was not properly noted by the Region in a particular case. Although the Agency's automated Case Activity Tracking System (CATS) can assist a Region in determining whether a general notice of appearance has been submitted on behalf of a particular party, it does not do so automatically, but rather is dependent upon an employee checking for this information in CATS. Moreover, if a party's name on the charge form is significantly different from the name previously listed in CATS, the general notice of appearance may not be noted in that case. Additionally, after a general notice of appearance is filed, a party may change its representative and fail to notify the Agency, resulting in our contacting the incorrect representative. Under all these circumstances, we concluded that it is virtually impossible to ensure that no mistakes will be made. For these reasons, the policy would free a Region from notice to a practitioner who has recently represented a party in an action before

that Region when that same party is named in either a newly-filed petition or charge.

In formulating this policy we did not distinguish between outside practitioners and in-house counsel. Most of the reasons noted above for adopting the policy would be applicable to both outside practitioners and in-house counsel.

As set forth in Memorandum OM 04-01, Regions will honor requests by representatives to be served with courtesy copies of charges and petitions only. Form NLRB-4702 has been disseminated in order to facilitate such requests. Such requests must be renewed on an annual basis.

Status Update: Would you kindly provide an update regarding any current C-case and R-case backlogs, the current timing from petition to hearing/decision to election.

Response: Casehandling in the Regional Offices continues to proceed in an efficient and highly effective manner. Our “c” case investigation goals are 7, 9 and 12 weeks, respectively, for Category III, II and I cases. We also seek not to exceed 8%, 10% and 10% unexcused overage cases in each of these categories. Unexcused overage cases in all Categories or ULP cases remain within goal: 1st quarter results compared with FY 2003 results are as follows:

Goal	1 st Q FY 2004	FY 2003
Category III NTE 8%	3.7%	4.3%
Category II NTE 10%	1.9%	2.7%
Category I NTE 10%	0.5%	0.8%

Situations Pending Preliminary Investigation, all cases filed and served in which no determination has been made, stood at 4,463 at the end of the 1st quarter of FY 2004; that number was 4,838 at the end of FY 2003. Situations Pending was as high as 7,400 at the end of FY 1998 and as low as 4,200 2 years ago.

Representation cases also continue to be processed efficiently. The first quarter election agreement rate was 89.5%, compared with FY '03 results of 88.5%; the median for elections in the 1st quarter of FY '04 was 39 days, identical to the '03 results, and 94.3% of elections were conducted in 56 days or less, better than the 92.5% reported in FY '03. Both C and R-case processing results are most sensitive to two variables: intake and staffing. Intake in FY 2003 was at about the 2001 level, but a 6% decrease from '02. The first quarter of this fiscal year saw a decline in intake compared with the same period last year: -2.4% in C-cases and -10.7% in R-cases. Our staffing level has declined slightly, with 946 professionals in the Regions at the beginning of FY 2003 and 932 at the beginning of FY 2004. Our goal is to keep the Field at approximately that level

throughout the year, filling-in behind attrition. The decline in staff is directly attributable to the budget resources available to the Agency.

Agency Toll Free Number: We understand the Agency is going to initiate an “800 number” system for telephonic intake. What type of training and guidance will be provided to the regions and their staff?

Response: The Agency deployed a toll free number for public information inquiries on December 15, 2003, see Press Release dated December 12, 2003. The number is 1-866-667-NLRB. The new toll free telephone service will be listed in more than 600 community telephone directories. Callers may call the toll free line to hear a recording describing the Agency’s mission, to talk with an Information Officer in one of the Board’s 32 Regional Offices, or receive a referral to other government services. The toll free number is equipped to accommodate English and Spanish speaking individuals. Hearing impaired citizens may contact the Agency’s TTY service at 1-866-315-NLRB (1-866-315-6572). The new line is expected to provide members of the public with easy access to the National Labor Relations Board’s Regional Offices and an enhanced opportunity to discuss employment-related concerns with the Agency’s staff.

Under most circumstances, calls from the toll free number will be directed to the Regional Offices servicing the geographic area from which they originate. Callers will not be required to listen to other recordings unless the line is already busy or the office is closed. In those situations, the Regional Office will arrange a prompt call back response. Since callers to the toll free number will be referred to Regional Office Information Officers, local training for Information Officers is expected to meet any need for training.

In the month of January we received 793 calls to the “800” number. We expect this number to increase as the number appears in more phone books and as more people learn of the service.

Information Technology Issues: Please provide a general review of the status of all information technology issues at the Agency. For example, what documents may not be filed electronically? Are there plans to permit additional electronic filings? Are there any Agency-wide instructions regarding the provision of Board agent email addresses in docketing letters? If not, why not? Is the Agency considering a more effective means of researching Advice Memos? Is the Agency in a position to conduct a demonstration of all current web-based resources at P&P’s February 2004 Mid-Winter Meeting. Are there plans to issue decisions, whether ALJ, Regional Director or Board, via e-mail? What if the parties are in agreement to service via e-mail?

Response: On June 11, 2003, the Board launched a pilot E-Filing project, a Web based system that allows the public to file documents online. The scope of documents allowed to be filed using this system initially was limited to allow for

immediate implementation without altering existing business practices in the Board's Office of the Executive Secretary (OES) or developing a back-end database system to assist in processing e-filed documents. This pilot project has made E-Filing available to the public while a more robust E-Filing system is developed.

E-Filing was limited to the following documents in 2003:

- Requests (and Oppositions to Requests) for Extensions of Time (EOTs) in C and R cases.
- Requests (and Oppositions to Requests) for Additional Pages for Briefs.
- Requests (and Oppositions to Requests) for Permission to File Amicus Briefs.

Other documents not prohibited and for which prior permission to file has been granted by the Board's Office of the Executive Secretary were also permitted.

The Board recently announced an expansion of the E-Filing program to include all documents in R-cases, see [Press Release](#), dated March 2, 2004. Board agent e-mail addresses currently are included in docketing letters when the assignment has been made.

As described in [OM Memo 03-74](#) and [OM Memo 04-43](#), the General Counsel has authorized Regions to receive and accept certain documents sent to a Regional Office as an attachment to an E-mail. E-mail communication between party representatives and Board agents is encouraged if it will facilitate case processing.

We believe that the new search capability on the redesigned Website provides a speedy and accurate tool for researching publicly available Advice Memoranda. Users can set the search to "simple" or "advanced" and also indicate if they want search terms highlighted in the search results. Those users who choose advanced search can enter several criteria, including a range of dates, whether the documents should or must contain search terms in the body, title, or description, and the desired number of results (10, 15, 100, or 500) sorted by relevance or sorted by title.

The Board has no current plans to issue decisions, whether ALJ, Regional Director or Board, via e-mail. However, electronic service via the Internet of Board and ALJ decisions is being explored, as well as e-mail notification to the representatives of the posting of the decision. Aside from software design issues and staffing issue that must be resolved to deliver this capability, our current budget problems complicate and delay progress on the project.

Transcripts: There is a continuing problem with the quality and timeliness of Agency hearing transcripts. Typically, the reporters tape the testimony and the transcripts are typed by transcribers who were not at the hearing. Does the Agency have any plans to specify quality and quick turnaround as bid factors?

Response: The Agency is continuing its efforts to improve the quality of court reporting, including exploring other types of reporting technologies. For instance, last year we examined the possibility of using modified “real time” reporting services. While such technologies might have the potential for improving the accuracy and timeliness of transcripts, the Agency ultimately determined that such technologies were prohibitively costly. Unfortunately, the budget prohibits consideration of this technology in FY 2004 as well.

However, in an effort to increase the pool of companies bidding on our reporting contracts this year, the Agency revised the contracts specifications to make them shorter and easier to understand. The Agency also provided pre-bid teleconferenced information sessions to prospective contracting candidates to explain our specifications and to address any questions.

Contracts are based upon “best value”, rather than based upon the lowest bid price. “Best value” takes into account such factors as reliability, technical expertise, financial stability and past performance. Accuracy and timeliness continue to be factors in the bidding process. The new reporting contracts were awarded for the term April 1, 2003 through December 31, 2003 renewable for one year thereafter. Some of the contracts have been awarded “conditionally” and the Regions were advised that continuation of the contracts during the initial year is contingent on the contractors’ compliance with the contract terms. We have advised the Regional Offices of the importance of monitoring the transcript quality and timeliness to ensure that the contractors’ performance meets the standards of the reporting contracts. A more specific description of these responsibilities is set forth in [OM 03-97](#), dated July 23, 2003.

The ABA Committee was informed that it could assist the Agency to ensure compliance with reporting contract specifications by contacting our contracting officer, Paula Roy, Chief, Contract and Procurement Section, with reports of deficiencies and timeliness problems with the transcripts in our proceedings. We have received complaints about transcripts from outside parties on three occasions in FY ‘03. On all three occasions, the contractor was notified and required to make corrections. In one of the situations, a “cure letter” was sent that advises the contractor that it will not be considered in the bidding process in the future because of problems in performance. The Agency can only move to correct transcript errors and to replace unsatisfactory contractors when deficiencies are brought to our attention. Our Regional Directors also are closely monitoring reporter performance. However, the reality is that in many situations we do not have a large number of companies bidding for the contract and we must select among companies that simply do not have a lot of competition for the contract.